No. 02-20843

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THERM-ALL, INC., ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Defendant-Appellant Therm-All, Inc. and its sole shareholder Robert L. Smigel (who also was a defendant).

2. Defendant-Appellant Supreme Insulation, Inc. and its only shareholders Tula D. Thompson (who also was a defendant), Doug Deaton and Joyce Deaton.

3. The United States Department of Justice Attorneys who have represented the United States in this matter are listed on the cover and page 15 of this petition.

4. Karl R. Wetzel of Wegman, Hessler and Vanderburg is Therm-All's attorney on this appeal and was Mr. Smigel's trial attorney.

5. Thomas R. Jackson, Stephen J. Squeri, Charles Kennedy and Isla Luciano of Jones Day Reavis & Pogue were Therm-All's trial attorneys.

6. David B. Gerger of Foreman DeGuerin Nugent & Gerger, and Curtis E. Woods of Sonnenschein Nath & Rosenthal, are Supreme's attorneys on this appeal. Mr. Gerger was Supreme's trial attorney and Mr. Woods was Ms. Thompson's trial attorney.

7. Jennifer L. Ahlen of Foreman DeGuerin Nugent & Gerger and Norman E. Siegel of Stueve Helder Siegel, also represented Supreme at trial.

8. Todd McGuire of Sonnenschein Nath & Rosenthal also represented Ms. Thomspon at trial.

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Dated: January _____, 2004

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STATUTES AND RULES

RULE 35(b)(1) STATEMENT

The holding of the panel majority in this case, that the government must prove an overt act within the statutory period if the statute of limitations is at issue, involves questions of exceptional importance concerning enforcement of the Sherman Act as well as other statutes that do not require proof of an overt act, and conflicts with prior decisions of the Supreme Court, this Court, and other courts of appeals. The case merits rehearing *en banc* for three reasons.

First, the panel majority's holding is irreconcilable with the Supreme Court's clear holding in *Nash v. United States*, 229 U.S. 373, 378 (1913), that the Sherman Act, 15 U.S.C. § 1, does not require proof of an overt act. This holding also conflicts with numerous decisions of other courts of appeals interpreting statutes that, like the Sherman Act, do not require proof of an overt act. *E.g., United States v. Spero*, 331 F.3d 57, 60 (2d Cir. 2003) (RICO; collecting cases holding that proof of overt act not necessary to prove that conspiracy continued into limitations period).

Second, the panel majority's conclusion that there is no evidence that the conspiracy existed after May 31, 1995 is wrong as a matter of law. Specifically, the panel majority conceded "that the conspiracy existed up through May 15, 1995," but held that "[t]he Government . . . fail[ed] to produce evidence" proving that the conspiracy existed after May 31, 1995. Slip op. at 12. This conclusion is contrary to the long established rule in this Circuit and others that if the government proves the existence of a continuing conspiracy – which the panel majority conceded it did in this case – that conspiracy is

presumed to continue to exist and the defendant has the burden of proving that the conspiracy was terminated or that the defendant took affirmative steps to withdraw. *United States v. Puig-Infante*, 19 F.3d 929, 945 (5th Cir. 1994)*; United States v. Branch*, 850 F.2d 1080, 1082 (5th Cir. 1988); *see also United States v. Gonzalez*, 921 F.2d 1530, 1547-48 (11th Cir. 1991) (a RICO conspiracy can be presumed to continue into statutory period). There is absolutely no evidence in this case that the conspiracy terminated between May 15 and May 31, 1995, or that any defendant took affirmative steps to withdraw from the conspiracy prior to the date, within the limitations period, on which the government served its grand jury subpoenas.

Finally, the panel majority's rejection of the affirmative evidence establishing that the conspiracy continued into the statutory period rests on its failure to understand how this conspiracy functioned and is inconsistent with *Plymouth Dealers' Ass'n of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960). The evidence established that this conspiracy operated by using price lists containing agreed-on prices. Slip op. at 2. The price lists being used by the conspirators in June 1995 were the same price lists containing previously agreed-on prices that the conspirators had used in May 1995 and for several months prior to that. Thus, all sales made by the conspirators in June 1995 were in furtherance of the conspiracy, whether those sales were made at the exact prices listed on the agreed-on price sheets or at some price discounted from those price sheets. As the Ninth Circuit explained in *Plymouth Dealers*, the determinative factor is that the conspirators used "an agreed starting point" – their price sheets. 279 F.2d at 132-33.

The fact that they discounted from that price sheet in many, or even most, of their sales does not change the fact that they violated and continued to violate the Sherman Act by agreeing on the price sheets to begin with, and using those price lists to make their sales. *Id.* The panel majority's contrary conclusion simply ignores well established law.

ISSUES PRESENTED

1. Whether a conspiracy statute that otherwise does not require proof of an overt act nevertheless requires such evidence to prove that a conspiracy continued into the period of the statute of limitations.

2. Whether a conspiracy that was in existence on May 15, 1995 is presumed to continue into June 1995, in the absence of any evidence that it terminated or that any defendant withdrew from it.

3. Whether the continued use of price sheets that contained prices previously agreed on by the conspirators is evidence that the conspiracy continued into the statutory period.

COURSE OF PROCEEDINGS

On May 31, 2000, a federal grand jury sitting in Houston, Texas, indicted Therm-All, Inc. ("Therm-All"), its president, Robert Smigel ("Smigel"), Supreme Insulation, Inc. ("Supreme"), and its president, Tula Thompson ("Thompson"), for conspiring, from January 1994 through at least June 1995, to fix the prices of metal building insulation sold in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. R.1.

On October 17, 2001, a jury convicted Therm-All and Supreme but acquitted Smigel and Thompson. R.279. On July 12, 2002, the court sentenced Therm-All to pay a fine of $1,500,000 and to serve a five-year term of probation. R.355. Supreme was fined $1,000,000 and sentenced to a five-year term of probation. R.356. Therm-All and Supreme appealed.

On December 3, 2003, a divided panel of this Court reversed. The panel majority first held that "the Government must produce evidence of an overt act that implies the existence of the alleged conspiracy during" the period of the statute of limitations. Slip op. at 6. It then concluded that the government had not proved such an act. *Id.* at 9-12. Judge Reavley dissented. He concluded that a rational jury could have found that overt acts had occurred within the statutory period, noting, among other things, that during the statutory period, the defendants "continued to charge customers pursuant to price lists agreed upon under the price-fixing agreement." *Id.* at 14-15.

STATEMENT OF FACTS

Most of the facts relevant to this petition are stated in either the majority or dissenting opinions. Briefly, Therm-All and Supreme are metal building fiberglass insulation laminators. In the early 1990s, price competition in the industry kept the selling price of their laminated products at record low levels (Tr. 161) creating "a dog eat dog market." Tr. 175-76. In January 1994, however, Therm-All, Supreme, and the three other major laminators in the industry agreed to raise prices for their insulation and adhere to the increases. Slip op. at 2. They did this by each issuing a price sheet

containing several price brackets, each bracket stating an agreed-on price based on the number of square feet of insulation ordered. *Id.*; Tr. 1768. Prior to their agreement, Supreme and two of the other conspirators had never exchanged their prices with competitors and had not used price sheets. Tr. 225-26, 1266-67, 1766-67, 2226, 3168-69. The conspirators took "care not to set prices at the exact same level" so that customers would not become suspicious. Slip op. at 2.

Importantly, the prices on the agreed-to price sheets were significantly higher than the prices prevailing before the agreement. *Id.* at 2, 13. Indeed, the fixed prices were so high and profitable that even if the conspirators sold a quantity at a lower price that applied only to a higher volume order ("jumping brackets"), or even if they priced a sale somewhat lower than the price sheet ("coming below or off the price sheet"), the conspirators would still make a bigger profit than they did before their agreement to raise and fix prices. Tr. 185-86, 250, 270-73, 1082, 2773-76; *see* slip op. at 13. Overall, the conspirators implemented "four significant price increases;" in February 1994, July 1994, December 1994, and March 1995. Slip op. at 2. The panel majority concluded that "the Government introduced convincing evidence . . . that a price-fixing agreement existed from January 1994 to May 1995." *Id.*

Because the indictment was filed on May 31, 2000, however, the government was required to prove that the conspiracy continued into the five-year statute of limitations period – *i.e.,* into June 1995. *See* 18 U.S.C. § 3282. The government submitted uncontradicted evidence that conspirators were still following the agree-to price sheets on

May 4, 5, and 15, 1995, and the panel majority characterized "[t]his evidence [as] highly persuasive that the conspiracy existed up through May 15, 1995." *Id.* at 12. Moreover, two government witnesses testified that the price fixing conspiracy continued until the government served subpoenas on June 22, 1995. *Id*. at 14-15. Corroborating this testimony are 90 invoices dated between June 1 and June 22, 1995, showing sales made at the applicable bracket price on the price sheets that were previously agreed to by the co-conspirators. Slip op. at 10. There was also testimony that it was only after the subpoenas were served that "[t]hings started returning to how they were before and things started becoming more competitive again" (slip op. at 14), and that prices dropped after the subpoenas were issued and had "dropped dramatically" by the time trial began. *Id.*

ARGUMENT

The jury, by its guilty verdict, rejected defendants' claim that the conspiracy had not continued into the limitations period. As Judge Reavley noted in his dissenting opinion, the jury's verdict is fully supported by the evidence. Slip op. at 15. The panel majority's decision to substitute its erroneous view of the evidence for the jury's finding is based on three significant legal errors, each of which warrants *en banc* review by this Court.

1. In *Nash,* the Supreme Court held that a Sherman Act violation does not require proof of an overt act. In fact, the Court could not have been any clearer (229 U.S. at 378):

[T]he Sherman Act punishes the conspiracies at which it is aimed on the common

> law footing – that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. The decisions as to the relations of a subsequent overt act to crimes under Rev. Stat. § 5440, in *Hyde v. United States*, 225 U.S. 347 [1912], and *Brown v. Elliot*, 225 U.S. 392 [1912], have no bearing upon a statute that does not contain the requirement found in that section. As we can see no reason for reading into the Sherman Act more than we find there, we think it unnecessary to offer arguments against doing so.

Notwithstanding what *Nash* plainly says, the panel majority held that the government was required to prove an overt act, or some further act of conspiring, within the period of the statute of limitations. Slip op. at 8. In fact, the Court in *Nash* expressly stated that cases like *Hyde and Brown*, which involved not only a conspiracy statute requiring proof of an overt act, but also, among other things, the significance of that requirement in proving the continuation of a conspiracy into the statute of limitations period,[1] "have no bearing" on the Sherman Act. 229 U.S. at 378. And because those cases "have no bearing" on the Sherman Act, there is no requirement in the Sherman Act or anywhere else to prove an overt act even if the statute of limitations is at issue. Moreover, the panel majority fails to explain how either the express language of the Sherman Act or the applicable statute of limitations supports the majority's holding that while the government is not required to prove an overt act as an element of the crime, it nevertheless must do so if the defendant raises the statute of limitations as an affirmative

[1] *See Brown,* 225 U.S. at 401; *Hyde,* 225 U.S. at 359, 367-70; *accord Huff v. United States*, 192 F.2d 911, 914-15 (5th Cir. 1951) (a statute's overt act requirement "lies behind" the rule that statute of limitations runs from last overt act).

defense.[2] Rather, like the Supreme Court in *Nash*, the panel majority should have read no more into the Sherman Act than it found there, and there is absolutely no reference to the need to prove an overt act for any purpose in that statute.[3]

Moreover, the Sherman Act is not the only federal conspiracy statute that does not require proof of an overt act. *E.g., Spero*, 331 F.3d at 60 (RICO conspiracy); *United States v. Pofahl*, 990 F.2d 1456, 1467-68 (5th Cir. 1993) (drug conspiracy). And courts interpreting those statutes consistently have held that they do not require proof of an overt act to prove that the conspiracy continued into the statutory period. *Spero*, 331 F.3d at 60 (citing cases from four circuits).[4] The Sherman Act should be interpreted exactly like the other statutes that do not require proof of an overt act even when the statute of limitations is at issue. Thus, rehearing *en banc* is necessary to reconcile the panel majority's decision with both *Nash* and the established law in other circuits.

2. The panel majority's second legal error was its holding that while the

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[2] The applicable statute of limitations says nothing about proving an overt act. *See* 18 U.S.C. § 3282. Only Congress has the authority to determine whether an offense should be subject to a statute of limitations, and some are not (*see*, *e.g.*, 18 U.S.C. § 3281 (capital offenses); 18 U.S.C. § 3286(b) (certain terrorism offenses)), and to define the duration of the statute.

[3] *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991), cited by the panel majority (slip op. at 7), does not support its holding. In *Brown*, in upholding a conviction the Ninth Circuit simply held, without any explanation, that the district court had not committed "plain error" when it instructed the jury that, on the one hand, the government was not required to prove an overt act to prove a Sherman Act violation but that, on the other hand, the jury did have to find an overt act within the statutory period. 936 F.2d at 1048.

[4] The Government cited *Spero* in a Fed. R. App. P. 28(j) letter sent to the panel and appellants prior to the oral argument.

government presented "highly persuasive [evidence] that the conspiracy existed up through May 15, 1995," its evidence was "impotent in showing that the conspiracy existed past May 31, 1995." Slip op. at 12. This holding is contrary to prior decisions of the Supreme Court, this Court and other courts of appeals addressing continuing conspiracies.

In *United States v. Kissel*, 218 U.S. 601, 608 (1910), the Supreme Court expressly held that a Sherman Act conspiracy, like a common law criminal conspiracy, is a "partnership in criminal purposes" that continues "up to the time of abandonment or success." Similarly, this Court has long held that a "conspiracy is presumed to continue unless the defendant makes a 'substantial' affirmative showing of withdrawal, abandonment, or defeat of the conspiratorial purpose." *Branch*, 850 F.2d at 1082; *accord Puig-Infante*, 19 F.3d at 945. That is also the law in other circuits regardless of whether or not the underlying conspiracy requires proof of an overt act and whether or not the statute of limitations is at issue.

In *Spero*, for example, the Second Circuit held that "where a conspiracy statute does not require proof of an overt act . . . and '[w]here a conspiracy contemplates a continuity of purpose and a continued performance of acts, it *is presumed to exist* until there has been an affirmative showing that it has been terminated[,] and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." 331 F.3d at 60 (emphasis in original); *accord United States v. Coia*, 719 F.2d 1120, 1123-25 (11th Cir. 1983) (no overt act required to prove that RICO conspiracy existed within statutory period; government can rely on presumption that conspiracy

continued); *Gonzalez*, 921 F.2d at 1547-48 (same); *United States v. Torres Lopez*, 851 F.2d 520, 524-25 (1st Cir. 1988) (same); *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987) (same).

The panel majority briefly addressed the government's continuing conspiracy argument in a footnote. Slip op. at 7 n.2. It noted that the Sixth Circuit in *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995), relied on the presumption that a conspiracy is presumed to continue in resolving a statute of limitations issue in a criminal antitrust case. But it claimed that the discussion was "dictum" and disregarded it. In fact, the statute of limitations was at issue in *Hayter Oil,* and what the Sixth Circuit said in resolving that issue cannot be dismissed as mere "dictum." *See Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) ("alternative holdings are binding precedent and not *obiter dictum*"); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 925 n.21 (5th Cir. 1977). Moreover, *Hayter Oil* is completely consistent with what the cases discussed above have long held, and the holdings of those cases cannot be dismissed as "dictum."

Finally, this case illustrates precisely why the continuing conspiracy presumption makes sense. As the panel majority notes, the price fixing conspiracy began in January 1994. The conspirators implemented their agreement by agreeing on price sheets that were then used to sell metal building insulation to their customers. And the conspirators from time to time issued new price sheets that also contained agreed-on prices. Slip op. at 2-3. Absolutely nothing happened after May 15, 1995, the last day the panel majority

found that the conspiracy existed (*id.* at 12), to indicate that the conspiracy terminated after that date. In fact, the conspirators were using the same price sheets containing agreed-on prices to make their sales on May 15, 1995, May 31, 1995, and on the day the grand jury subpoenas were served on June 22, 1995. *See* slip op. at 14-15. Nor did the defendants claim that they withdrew from the conspiracy after May 15, 1995.

On these facts, a reasonable jury could conclude, as Judge Reavley explained (*id.*), that the continuing conspiracy that the panel majority concedes was in full force and effect on May 15, 1995, continued to exist after May 31, 1995, and thus existed during the period of the statute of limitations. The panel majority's contrary conclusion is based on the erroneous view that the government cannot rely on the presumption that a continuing conspiracy continues to exist absent any evidence that it had been terminated. Rehearing *en banc* is necessary to resolve the conflict between the panel majority's decision and the decisions of this Court recognizing that presumption and the decisions of other courts of appeals applying it to establish that a conspiracy existed within the statute of limitations period.

3. The panel majority's conclusion that the government did not prove an overt act within the statutory period reflects a misunderstanding of both the Sherman Act and how this particular conspiracy functioned. In *Plymouth Dealers*, the Ninth Circuit noted that the Supreme Court has long held that a horizontal agreement to fix prices is *per se* unlawful. 279 F.2d at 131-32, *citing United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98 (1927). The defendants in *Plymouth Dealers* agreed on a price list for

automobiles, which was then used in negotiating the actual selling price to the customer. They argued, among other things, that their price list did not violate the Sherman Act in the absence of evidence that anyone adhered to it or that it was actually used to fix prices. 279 F.2d at 130. And in fact, the price list price generally served only as the starting point in the negotiations and most cars were sold at some discount from that price. The Ninth Circuit rejected this argument (279 F.2d at 132) (emphasis in original):

> The competition between the Plymouth dealers and the fact that the dealers used the fixed uniform list price in most instances only as a starting point, is of no consequence. It *was* an agreed starting point; it had been agreed upon between competitors; it was in some instances in the record respected and followed; it had to do with, and had its effect upon, price.

The court then observed that "[t]he fact that there existed competition of other kinds between the various Plymouth dealers, or that they cut prices in bidding against each other, is irrelevant." *Id.*

In this case, the panel majority failed to understand that the conspiracy at issue had exactly the same effect on price as the conspiracy in *Plymouth Dealers*. Specifically, it focused narrowly on the fact that the government produced "only 90 invoices from [the conspirators'] records to prove that a price-fixing agreement continued into June 1995." Slip op. at 10. It then claimed that these invoices "constituted only five percent of sales during that time." *Id.* But this analysis erroneously assumes that only sales made at the applicable bracket on the price sheets were in furtherance of the conspiracy. In fact, just like the defendants in *Plymouth Dealers*, the defendants in this case had agreed on price sheets and made all of their June sales using the same price sheets containing agreed-on

prices that they had used in prior months. That the price sheets were simply the starting point in negotiating the actual sales price to some of their customers, and that discounts from the applicable bracket price on the price sheets were common (*e.g.*, "jumping brackets") is, as *Plymouth Dealers* held, irrelevant. 279 F.2d at 132. Thus, every June sale, whether at the price stated on the price sheet or at some discounted price, was pursuant to the conspiratorial agreement and in furtherance of the conspiracy. *See, e.g.,* Tr. 185-86, 250, 270-73, 1082, 2773-76 (explaining that prices on price sheets were so high that jumping brackets or even sales somewhat below the price sheets were still more profitable than sales before agreement to raise prices).[5] And that is why Judge Reavley

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[5] In a footnote, the panel majority criticizes the government for "not provid[ing] this Court with the invoices that did not correspond to the price-fixing sheets because of the burden that such a 'voluminous exhibit' would create." Slip op. at 10 n.4. This criticism is another reflection of the panel majority's confusion about the nature of the price fixing conspiracy in this case. As noted above in the text, whether a statistically significant number of invoices did or did not exactly "correspond to the price-fixing sheets" is irrelevant. The determinitive fact is that the conspirators continued to use price sheets containing agreed-on prices regardless of what the actual sales price was in any particular transaction. *Plymouth Dealers*, 279 F.2d at 132-33. Moreover, in footnote 30 of its brief (U.S. Br. 38), the government explained that the invoices in question were in GX86B, which consisted of 11 boxes containing literally thousands of invoices from January 17, 1994 through June 22, 1995. The government further noted that GX86B contains at least 90 invoices dated between June 1 and June 22, 1995, for sales at the applicable bracket price on the price sheets then in use. Finally, the government expressly offered to transmit all of GX86B to the Court if the Court wanted to examine the entire exhibit, but the Court never asked for the exhibit.

Even assuming that establishing the exact percentage of invoices that "correspond[ed] to the price fixing sheets" had some evidentiary significance in this case, we are not aware of any support in the record for the panel majority's statement that "only 5 percent of sales during [the statutory period]" corresponded to the price sheets. The panel majority did not explain how it calculated that the 90 sales invoices referred to by the government "constituted only 5 percent of sales during [the statutory period]," did not provide a record citation for its statistic and, as explained above, never examined all the invoices from the statutory period.

was correct in his dissenting opinion when he relied on, among other things, the fact that "in June 1995 the conspirators continued to charge customers pursuant to price lists agreed upon under the price-fixing agreement, as evidenced by numerous examples of invoices and corresponding price lists admitted at trial" to support his belief that the jury's verdict was supported by the evidence. Slip op. at 14.

Without any citation to the government's brief, the panel majority also claimed that the government was attempting "to infer the agreement's continued existence from the fact that prices remained at the same level a month after the last overt act occurred," an inference the panel majority rejected as "doubtful." Slip op. at 5. But the government never made that argument. Rather, as explained above, the government argued that when, as in this case, conspirators agree on price sheets that are then used in negotiating actual sales prices to customers, the conspiracy continues to exist so long as the conspirators are using those price sheets.

The government presented other evidence that the conspiracy continued into the statutory period that the panel majority did not find persuasive (slip op. at 9-12), but which Judge Reavley found could have been relied on to support the jury's verdict. *Id.* at 14-15. We agree with Judge Reavley but, in any event, the fatal legal flaw in the panel majority's opinion is its failure to recognize that under *Plymouth Dealers*, all sales made in June by the conspirators were pursuant to and in furtherance of the conspiracy because they were all based on the agreed-to prices on the price sheets then in use. Rehearing *en banc* is necessary to correct the panel majority's misunderstanding of the Sherman Act, and to

reconcile the panel majority's decision with *Plymouth Dealers*.

CONCLUSION

The petition for rehearing *en banc* should be granted and the judgments of conviction should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, John P. Fonte, a member of the bar of this Court, hereby certify that today, January 12, 2004, I caused two copies of the accompanying Petition of the United States of America For Rehearing En Banc to be served by Federal Express on the following:

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